



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Rokach Engineering P.C.

File: B-229680

Date: February 3, 1988

DIGEST

In light of agency discretion under Small Business Innovation Research Program to fund or reject proposals, General Accounting Office review of decision to reject protester's proposal is limited to determining whether agency complied with any applicable regulations and solicitation provisions and whether agency acted fraudulently or in bad faith.

DECISION

Rokach Engineering P.C. protests the Department of Education's failure to award it Phase I research funds for a project that the firm proposed in response to Topic 8, "Innovative Approaches to Instruction of Adult Learners," of request for proposals (RFP) No. 87-014. Rokach alleges that the agency based its decision on ratings given by three outside reviewers, two of whom recommended funding but one of whom arbitrarily and wrongfully gave Rokach's proposal such a low rating that Rokach's composite score could not qualify for funding.

We deny the protest.

The solicitation was issued under the Small Business Innovation Research (SBIR) Program. This program was established under the Small Business Innovation Development Act (Innovation Act), 15 U.S.C. § 638 (1982), which requires federal agencies to reserve a portion of their research and development efforts and authorizes them to award "funding agreements" to small businesses based upon evaluation of proposals submitted in response to solicitations issued pursuant to the Innovation Act.^{1/} The solicitation provided for each Phase I proposal to be evaluated on a competitive basis in accordance with the expressly stated evaluation

^{1/} These funding agreements can take the form of contracts (as here), grants or cooperative agreements. 15 U.S.C. § 638(e)(3).

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criteria. Among these were the scientific and technical quality of the proposed project, the qualifications of the principal investigator, his staff and facilities; and importance of the problem and anticipated benefits of the proposed research.

The agency reports that four principal operating components of the agency had sponsored the nine topics selected for inclusion in the RFP, that its Office of Educational Research and Improvement (OERI) had sponsored two of these topics, numbers 8 and 9, but that as a result of budget reductions, OERI was unable to fund any projects. Consequently, the agency made no awards under Topics 8 and 9.

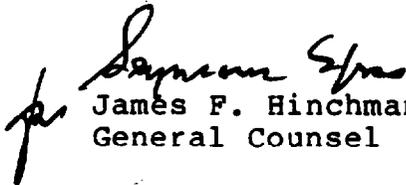
The protester characterizes this as an after-the-fact explanation and argues that the agency eliminated Rokach from consideration 3 months before deciding not to fund any proposals under Topics 8 and 9. The protester argues that by failing to verify that reviewers complied with the agency's instructions for proposal review, the agency violated its own regulations by allowing these reviewers to violate these instructions. (According to the protester, the reviewers failed to provide detailed narrative justification for their scoring which was then simply tabulated by the agency.) The protester also claims that the agency acted in bad faith in issuing the RFP as it never intended to make an award under Topic 8, and that as long as the agency is funding a SBIR program, it is unfair and arbitrary to exclude all proposals under a topic as long as funds are available for the SBIR program.

The selection of research proposals solicited pursuant to the Innovation Act is a competitive procedure. Anthra Pharmaceuticals, Inc., B-220523, Jan. 8, 1986, 86-1 CPD ¶ 17. However, the law does not require award under this program to be made to any particular proposer, and a Small Business Administration Directive specifically provides that the "agency is under no obligation to fund any proposal or . . . specific number of proposals . . . [and] may elect to fund several or none of the proposed approaches . . ." The RFP here essentially contained this language. Since the agency, therefore, has significant discretion to determine what proposals, if any, it will accept, our review in cases such as this is limited to determining whether the agency violated any applicable regulations and solicitation provisions, and whether the agency acted fraudulently or in bad faith. Twentyfirst Century Technological Innovations Research and Development Enterprising, B-225179.2, Apr. 1, 1987, 87-1 CPD ¶ 368.

The protester's argument that the firm was prejudiced by the evaluator who gave a low score to its proposal is not supported by the record. This is because, even if this evaluator's scores are eliminated, Rokach would stand no higher than fifth among potential awardees under Topic 8, and none of the four higher-rated proposals received an award under the RFP because funding was simply not available due to a Congressional reduction in the agency's budget. In this regard, an agency's determination that funds are not available is a sufficient reason not to make award and, in effect, to partially cancel the solicitation. See generally Kos-Kam Pelasgus, Joint Venture, B-225841, Apr. 1, 1987, 87-1 CPD ¶ 370.

While the protester makes a general allegation of agency bad faith in issuing the RFP, it offers no evidence apart from pointing out that the actual awards made varied greatly in number from the agency's original expectations. In our view, this is no evidence that the agency was trying to mislead offerors; paragraph 5.1 of the RFP clearly warned offerors that execution of the program depended upon receipt of appropriated funds not yet available and paragraph 5.13 advised offerors that the RFP was intended for informational purposes and reflected current planning as of the time of issuance. In this regard, the protester argues that a July 1 memorandum contained in the agency report states that OERI was only interested in funding Topic 9; however, the full text of that memorandum shows that, in fact, it served to notify the agency SBIR coordinator of severe budget cuts reducing OERI's program and that the reference to Topic 9 reflected a reestablishment of priorities in the face of fiscal restraints. In the same memorandum, OERI asked the SBIR coordinator to advise Topic 8 proposers of the intention not to fund any of their proposals, an intention that had by that time been communicated to protester. We therefore find no evidence of bad faith or fraud beyond the protester's bare allegations.

Consequently, the protest is denied and, therefore, the protester's claim for the costs of preparing its proposal and pursuing this protest is denied.


James F. Hinchman
General Counsel